



UNIVERSITY OF
TORONTO
FACULTY OF LAW



**UNIVERSITY OF TORONTO
FACULTY OF LAW
TRIAL ADVOCACY COURSE
2006**

**MATERIALS FOR TRIAL ADVOCACY
PROBLEMS AND CASE FILES
*LAW SCHOOL EDITION***

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**TRIAL ADVOCACY
CASEBOOK
UNIVERSITY OF TORONTO
FACULTY OF LAW
FALL TERM 2006**

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TRIAL ADVOCACY COURSE

COURSE DESCRIPTION

1. Materials

Required Readings (Available from Law Book Store)

- (a) Casebook: Materials for Trial Advocacy: Problems and Case Files.
- (b) Text: Mauet – Fundamentals of Trial Techniques.
- (c) Course Description

Optional Readings (On reserve).

There is a book of readings on reserve in the library entitled Pilkington and Watson, ed, Selected Readings in Trial Advocacy (1981, revised 1988). A separate bibliography is included with these materials, which you may find useful during the course.

You will frequently make reference to the law of evidence and procedure and will want to have access to:

- i) A text on evidence - recommended: Sopinka Lederman and Bryant, The Law of Evidence in Canada (Toronto, Butterworths, 1992).
- ii) Evidence Act, R.S.O. 1990, c.E.23.
- iii) Canada Evidence Act, R.S.C. 1985, c. C-5.
- iv) The Ontario Rules of Civil Procedure.
- v) Criminal Code, R.S.C. 1985, c. C-46.

Ethical Questions frequently arise in the trial advocacy course. Please read carefully the materials in the casebook about ethics and in particular the Principles of Civility contained therein.

2. Use of Casebook and Sequence of Study

The Casebook contains Readings and Casefiles. Some of the Casefiles contain instructions for use in a Trial Advocacy programme format. Others do not. The Sequence of Study, which will be distributed separately, will contain directions as to the readings to be done, the case file to be worked on, and the assignment or specific task for the evening in question.

3. Learning Method

The purpose of the course is to assist you in developing the basic skills of trial advocacy so that you can conduct a trial from beginning to end with reasonable competence.

The method and materials are based on a program developed in the United States by the National Institute for Trial Advocacy (NITA). The method is explained in the Introduction to the Casebook. Basically, the techniques employed are (a) demonstration by experienced counsel, (b) student performance, and (c) critique.

How, within this framework, do you develop the requisite skills to a reasonable level? Obviously the major key is careful preparation for each assignment. But how do you prepare? The assigned readings will assist you-- and you should read them. After you have done that, and carefully read and analysed the assigned problem, what should you be considering in preparing for your performance?

There are several aspects of the teaching methodology to be used in this course which call for particular explanation.

Although you are expected to prepare the whole of the problem(s) that you are assigned each evening, when it comes to in-class performance, you will only be called upon to perform a segment - typically 5 minutes. Your instructor will direct you to the segment you are to perform. There is a specific rationale for this "5 minute format". Experience indicates that trial skills are developed best by students frequently performing short segments, rather than a single long performance. Obviously if each student was given the opportunity to do the complete assignment each evening, not every student could perform even one assignment on a given evening. Experience also indicates that 5 minutes gives you an opportunity to adequately demonstrate your present level of performance so that suggestions as to how to improve your performance can be offered. The reality is that if you perform for 10 minutes rather than for 5 minutes, you would essentially repeat the standard of performance that was demonstrated in the first 5 minutes.

In class, you will normally be called upon in pairs. When you have been called up, but are not examining, you will be expected to play the role of opposing counsel and to make any proper objections. Initially, you may be asked to make all possible

objections, and later, only the objections you would choose to make to serve your strategy at trial. In addition, the non-performing students will be responsible for making any objections overlooked by the opposing counsel. In preparation for making and responding to objections, we recommend that you review the applicable evidence law. However, this is not a course in evidence and the focus of your preparation and performance should be the assigned problems. Most instructors will not permit performance time to be taken up debating the evidentiary points.

Unless directed otherwise by your instructor, you are to assume that all problems arise in a trial that is being conducted before a judge and jury. Given that civil jury trials are now quite rare in Canada, questions are often raised as to why we use this assumption. The reason is that law students, for some strange reason, have it firmly fixed in their minds that judges like to have the facts presented in a complicated manner and they also like to be bored. Obviously this is untrue. On the other hand, students recognize the need to simplify the facts for a jury and to make the story-telling interesting. By assuming that all the assigned performances arise in the context of a jury trial, it is hoped that you will indeed strive to make your factual presentations simple, comprehensible and interesting.

4. Teaching Team

The teaching team consists of trial lawyers experienced in a wide variety of civil and criminal matters, assisted by group leaders who are drawn from graduates of the previous years' trial advocacy courses. Their role is to assist in administering the course, to provide advice and guidance about assignments, to conduct demonstrations that are more realistic and accessible than those tours de force often provided by faculty, and to be a contact point for the group to which each is assigned.

Since advocacy is an art and not a science, you should not be surprised if you receive differing (and sometimes conflicting) comments from the instructors. You should also not be surprised if some instructors disagree with the approach suggested in the text. Some students can find this frustrating. However, the point of a mixed teaching team is to present you with a range of critical, and hopefully helpful suggestions, from which you will develop your own advocacy style.

5. Class Witness Assignments

Except for the exercises dealing with experts, you will not meet with your witnesses. At this stage of your development, we feel there is more to be learned from conducting your examinations without preparing or rehearsing with your witnesses. The role of the witness in each problem to be performed in class will be played by a member of your group or a member of faculty. We will be trying as far as possible to have a member of faculty play the role of witness, so as to alleviate you of the burden of this task, and also, to prevent the inter colleague stress that can arise during cross

examination role playing. However, each of you should be prepared to play the role of the witness. Students assigned to be witnesses must also be prepared to carry out the exercise assigned as an "X" or "Y". Please take witness assignments seriously - learn your part and play your role seriously. There is nothing more discouraging for a person doing an examination or a cross examination than to be confronted with a witness who has to check the problem in order to figure out what liquor store was under surveillance, or who just doesn't know the critical facts at all.

6. Attendance

Attendance at each class session is compulsory. If you will be absent for any of the classes, you must contact Merrill Boden at 978-4908 to advise that you will be absent. If you are absent for discretionary (non illness related) reasons, a zero grade will be assigned to you for the class in which you are absent. As each performance is graded, and as final grades are based upon an average of the grades assigned in each class, absenteeism (except in the event of illness related absenteeism) will negatively affect the final grade. The schedules of the instructors do not allow for make up classes. We will accommodate any illness related absence to the extent possible. However, discretionary absences will result in a grade of zero being assigned to that particular evening.

7. Final Trials

(a) Trial teams and cases:

The culmination of the course will be all-day trials which will be conducted on the **weekend following the last formal class**. These final trials will be held at the Courthouse, 361 University Avenue, in conjunction with York University Osgoode Hall Law School students taking a similar course. Instructors or experienced trial counsel will serve as judges. Pairs of Osgoode students will try a case against pairs from the University of Toronto.

You may choose a trial partner from the students in the class. Otherwise, you will be assigned a partner. Traditionally, Osgoode has taken on the task of scheduling the trials and the trial teams. This is a difficult task, and one that has usually made most people happy. However, it is possible that it will be simply impossible to accommodate your trial preference. We would ask for your understanding if this occurs. You should complete the Case Preference Form that will be circulated and submit it pursuant to the instructions given on it by the deadline required. No changes are permitted. You will be informed in late October or early November of your actual trial date and assignment.

(b) Witnesses:

It will be the responsibility of each trial team to arrange for and prepare the witnesses they plan to call.

(c) Jurors:

You should prepare to invite friends, family, or others to attend at your final trial and play the role of a juror.

(d) Trial Book:

You are required to prepare a trial book for use at the trial. A trial book normally contains the following:

- (i) a tactical analysis of the case, setting forth your theory of the case, the problems you anticipate and how you expect to handle them;
- (ii) a proof check list, setting forth (a) every fact you must prove as part of your case, indicating the source or sources, i.e. witnesses, exhibits, judicial notice, admission, etc.; (b) every fact the other side must prove;
- (iii) outlines of your Opening Statement and Closing Argument;
- (iv) a list of witnesses you expect to call, in the order you expect to call them;
- (v) a complete outline of your preparation for the direct and cross-examination of all witnesses, each outline starting on a separate page, and your notes of items to cover in re-examination;
- (vi) copies of all exhibits you plan to introduce;
- (vii) copies of any previous statements made by witnesses, with key passages indexed and a note as to the manner in which the statements are used, if at all;
- (viii) legal memoranda on the substantive issues;
- (ix) legal memoranda on any anticipated evidence issues;
- (x) written outline of proposed jury instructions.

For further direction, see articles in Selected Readings and those referred to on the reading list.

8. Evaluation

Your final grade will be based upon your class participation (including being adequately prepared for witness assignments), any written submissions required during the course, and satisfactory completion of the final trial. The final trial will be graded based on the trial judge's assessment of your performance. The trial must be satisfactorily completed in order to obtain credit in the course.

Weekly performances are scored out of 10 and based on preparation, theory and presentation. At the conclusion of the course, the performance grades are aggregated and divided by the total number of assignments performed for a final grade out of 10. The grade of each student in a group is then reviewed by the faculty to ensure that it fairly represents the student's performance throughout the course. All grades are reviewed by the Course Chair to ensure consistency among sections. Spotty attendance or non-performance in the final trials without adequate explanation will affect your grade.

Student evaluation of the course is taken seriously and past evaluations have resulted in changes (hopefully improvements) to the course. Evaluations will be distributed and you will be handing them in during that class. Consistent with Faculty policy, no evaluations are read by instructors until grades have been submitted to the Records Office.

9. Reading about Trial Advocacy

A major focus of this course is learning by doing coupled with critique of your performance. This involves thorough preparation and the ability to listen to the comments made on your performance and that of other students in your class. The emphasis on performance in class leaves little or no time for lecturing. **However, this gap can and must be overcome by out of class reading.**

The writing on trial advocacy is voluminous, increasing, varied in quality and utility (i.e. some people find author A very useful, while others may not). To get the most out of the course you should do the reading. Each week there will be specific suggested reading assignments, however, these do not represent all the reading you should do in this course. The following represent the overall reading goals for the course.

Mauet should be read in its entirety by the end of the term.

At the outset, or by the end of the course, you should read all of one (or both) of the following books: Sopinka, The Trial of an Action; Williston & Rolls, The Conduct of an Action. While not exclusively concerned with trial advocacy in the narrowest sense, they both deal with preparing for and conducting a civil trial. You may wish to purchase your own copies. Both are published by Butterworths.

You should read "Some Points on Trial Advocacy", found in the Casebook, which is not meant to be a substitute for more substantive readings, but which outlines some basic points with regard to trial advocacy.

In addition to the assigned text, there are five recently published Canadian texts on Trial Advocacy which are well worth your attention. They are on reserve in the library.

Earl Levy, Examination of Witnesses in Criminal Cases (Carswell, 1991).

F. Moskoff (Editor), Advocacy in Court - A Tribute to Arthur Maloney (Canada Law Book, 1986).

R. Salhany, Cross Examination: The Art of the Advocate (Butterworths, 1988).

J. Olah, The Art and Science of Advocacy, (Carswell, 1990).

G. Adair, On Trial, Advocacy Skills Law & Practice (Butterworths, 1992)

10. Arnup Cup Trial Advocacy Competition

This is an annual competition among Ontario law schools which is normally held at the University of Windsor Law School in February or March following the course conclusion. The University of Toronto sends a team of two students selected by the instructors from the students in the Trial Advocacy Course. The selection of the team will be made following the final trials, and this selection is made following consultation with all faculty. The University of Toronto has been the recipient of the Arnup Cup in 2000, 1999, 1997, and 1996 and a runner up in 2001 and 2005.

11. The Sopinka Cup Competition

In 1999, the first annual national trial advocacy competition was held in Ottawa, with teams from each of the provinces competing. This competition is sponsored in part by the American College of Trial Lawyers, and by firms across Canada.

Over the past ten years of the Trial Advocacy course at the University of Toronto, we have been informed that the course has been a very positive experience for those who have taken it. We, the faculty, are proud to be part of a course that we hope will prove helpful in whatever area of law is pursued by those taking the course. We hope that you will enjoy the course as much as we enjoy teaching it.

